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July 24, 2008

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: February 5, 2008

Case Number: TSO-0596

This decision concerns the eligibility of XXXXXX XXXXXX ("the Individual") for a DOE access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's request for an access authorization should be granted. For the reasons detailed below, it is my decision that the Individual's request for an access authorization should not be granted at this time.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) local security office (LSO), informing the Individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization.¹ *See* Notification Letter, July 2, 2007.

The Notification Letter stated that the Individual's responses on a February 2005 Questionnaire for National Security Positions (QNSP), where he failed to list various arrests and provided inaccurate information regarding his discharge from the military in 1974, raised security concerns under 10 C.F.R. § 710.8(f) (Criterion F). False statements or misrepresentations by an individual during the course of an official inquiry regarding the individual's eligibility for access authorization, including responses during personnel security interviews or on security questionnaires, raise serious doubts regarding the individual's honesty, reliability, and trustworthiness.

Question 23 of the QNSP asks, in relevant part, whether an individual has ever been charged with or convicted of any felony offense; whether an individual has ever been charged with or convicted of any offenses related to alcohol; and, whether the individual has been arrested or convicted of any other offenses in the last seven years. *See* DOE Ex. 6a. In response to question 23, the Individual listed his three felony convictions for "possession [of a controlled substance]" – in September 1998, April 1999, and June 1999. *Id.* According to the Notification Letter, the

¹ Access authorization, also known as a security clearance, is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

Individual failed to list the following applicable arrests: “Driving While License Suspended” (March 1982); “Reckless Driving (Alcohol Related)” (August 1992); “No Valid Driver’s License” (September 1992); “Failure to Appear” (October 1992); “No Driver’s License” (April 1993); “Burglary/Menacing/Controlled Substance” (March 1998); “Possession of a Controlled Substance” (October 1998); “Burglary I and Possession” (November 1998); “Driving While Suspended” (December 1998); “Delivery of a Controlled Substance” (January 1999); and, “Controlled Substance Offense (2 counts)” (February 1999); “Controlled Substance Offense” (July 2001). *See* Notification Letter.

The Notification Letter also states that the Individual misrepresented the nature of his 1974 military discharge. The Individual attributed the discharge to a hearing problem. His record indicates that he received an “Other Than Honorable” discharge following a series of unauthorized absences. *Id.*

The letter also cited the Individual’s criminal history as a security concern under 10 C.F.R. § 710.8(l) (Criterion L). Criterion L concerns refer to conduct tending to show that the Individual is “not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l).

According to the Letter, the Individual was “charged with as many as 20 separate crimes,” including “three felony convictions,” one of which was as recent as 2001. *See* Notification Letter. The Letter states that the seriousness of the crimes and the period of time over which they occurred raise concerns regarding the Individual’s honesty, reliability, and trustworthiness. Finally, the Notification Letter referred to a webpage created for the Individual’s company, and listing him as the contact, which stated that the company supported technology at a DOE site based on classified patent filings. The Letter indicated that this raised a concern under Criterion L because using “statements concerning the government’s classified patents does not appear to be responsible [behavior]” for a potential security clearance holder. *Id.*

Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual’s Letter, January 23, 2008. At the hearing, the Individual, represented by counsel, presented his own testimony, as well as the testimony of a colleague and a psychiatrist.

II. EVIDENCE PRESENTED

A. Documentary Evidence

The Individual, through his counsel, submitted various exhibits to support his position that he did not intentionally falsify or withhold information from the DOE and that he is honest, reliable and trustworthy. Among the Individual’s exhibits were five letters from the Individual’s colleagues attesting to the Individual’s good character. *Indiv. Exs. 2-4, 8-9.* In each of the letters, the Individual’s colleagues state that he is honest and trustworthy. The Individual also submitted the results of a polygraph examination in which the Individual participated pursuant to his attorney’s advice. *Indiv. Ex. 6.* During the examination, the Individual was asked whether he intentionally withheld information on his QNSP and answered that he did not intentionally withhold or falsify

information. The polygraph examiner concluded that the Individual's responses were "not indicative of deception." *Id.* Finally, the Individual submitted an extensive list of his professional accomplishments. *Indiv. Ex. 10.*

B. Hearing Testimony

1. The Individual

The Individual discussed his answers on the QNSP. He stated that he believed the questions were asking for convictions only and, therefore, he did not list his DUIs. *Tr. at 69, 78.* He stated that he did not believe he was required to list arrests for which the charges were dismissed. *Tr. at 72.* Therefore, he did not list the DUIs or other misdemeanor charges cited in the Notification Letter. *Tr. at 69.* The Individual added that two of his three felony convictions have been reduced to misdemeanors on his record and that the third conviction would be similarly reduced in the near future.² *Tr. at 45.* The Individual maintained that he was not trying to keep information from the DOE. He stated, "if I was going to be embarrassed about something and not want to explain it or try to cover it up ... what I would try and cover up is felony convictions, not things that were dismissed." *Tr. at 71.*

The Individual testified that he did not intentionally misrepresent the nature of his 1974 military discharge. *Tr. at 51.* In that regard, he stated that he made mistakes in completing his QNSP. *Id.* Regarding the webpage cited in the Notification Letter, the Individual stated that he had never seen it and was not involved in its creation. He stated that his company hired an independent consultant to seek out investors and that the webpage was probably created by that consultant. *Tr. at 51-52.*

With respect to his use of illegal drugs, the Individual stated that he became involved in a troublesome lifestyle for a short period of time when he moved in with his ex-wife to care for her as she suffered from a terminal illness. *Tr. at 39-40, 42.* According to the Individual, his ex-wife's lifestyle involved methamphetamines and alcohol and, as he spent time with her, he became drawn into that lifestyle. *Tr. at 43.* The Individual stated that two of his arrests for possession of methamphetamines were the result of his ex-wife leaving her drugs in his car. *Tr. at 41-42.* He stated that, because she was so ill, he accepted responsibility for the drugs found in his vehicle so that she would not go to jail in her condition. *Tr. at 42.*

The Individual stated that he has learned from his past mistakes. *Tr. at 59.* He added, "I basically saw the error of my ways." *Id.* He also stated that the only person who could possibly draw him down that same path of drug use and other problems was his ex-wife, who is now deceased. *Tr. at 60.* The Individual believes he has his life "straightened out." *Id.* He added,

I'm a very private person because of the work I do. I don't socialize ... I work seven days a week. I have had bad spots in my life. If you figure out the time of it over [my life], it is not that much of a period. It is just that the things that happened were very bad ... And I saw a long time ago that if I do behaviors that

² Following the hearing, the Individual submitted a document indicating that his third felony conviction was reduced to a misdemeanor on May 29, 2008. *Indiv. Ex. 11.*

are not – basically not within the norms of society that I get in trouble and it costs me a lot to get out of trouble. I am an honest person. I try my best to help everybody that I can ... I have no desire to drink or do drugs again. It is basically a dead end road.

Tr. at 81. The Individual stated that there is nothing in his life which will make him use drugs again or engage in other criminal behavior. Tr. at 82.

2. The Individual's Colleague

The Individual's colleague met the Individual in Fall 2004 through work. Tr. at 14. He frequently interacts with the Individual, primarily for professional reasons. Tr. at 15-16. The Individual's colleague stated that the Individual has a good reputation within his company. Tr. at 22. He added that he has never seen the Individual under the influence of drugs or alcohol, and he did not believe the Individual could be blackmailed or coerced. Tr. at 19, 23-24. The Individual's colleague stated that the Individual was "very frank" with him about his past. Tr. at 25. He stated that he has never known the Individual to lie, adding "I never got the feeling that [the Individual] was hiding anything from me." Tr. at 32-33. The Individual's colleague stated that the Individual "[got into a lifestyle that is not pretty. But I think ... people can be rehabilitated ... I think he has changed. I think he has acted responsibly." Tr. at 28.

3. The Psychiatrist

The Psychiatrist evaluated the Individual in April 2008. Regarding the Individual's honesty and candor, the Psychiatrist stated, "[the Individual] was quite willing to admit and describe his past errors, past misbehavior and criminal behavior. He discussed with me issues that I think most of us would find hurtful and he did it in a discreet an open way."³ Tr. at 96-97.

III. STANDARD OF REVIEW

The regulations governing the Individual's eligibility for an access authorization are set forth are 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials").

Under Part 710, the DOE may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). Derogatory information includes, but is not limited to, the

³ The Psychiatrist testified at length regarding the Individual's rehabilitation from an alcohol problem. Because the Individual's past use of alcohol is not cited as a security concern, I do not believe it necessary to summarize the Psychiatrist's testimony on the subject in this decision. See Notification Letter.

information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security concern, the Hearing Officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. 10 C.F.R. § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a). In order to reach a favorable decision, the Hearing Officer must find that “the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

IV. ANALYSIS

A. The Security Concerns

As stated above, Criterion F concerns involve false statements or misrepresentations by an individual during the course of an official inquiry regarding the individual’s eligibility for access authorization, including responses during personnel security interviews or on security questionnaires. Such statements or misrepresentations raise serious doubts regarding the individual’s honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent that individual can be trusted again in the future. *See, e.g., Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,515 (1995); *Personnel Security Hearing, Case No. VSO-0281*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff’d*, 27 DOE ¶ 83,030 (2000).

Similarly, Criterion L concerns refer to conduct tending to show that the Individual was “not honest, reliable, or trustworthy, or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security.” 10 C.F.R. § 710.8(l).

Given the Individual’s incomplete or inaccurate answers on the QNSP and his criminal history in general, the LSO had ample grounds to invoke Criteria F and L. The only issue remaining, then, is whether the Individual has adequately mitigated the security concerns.

B. Mitigating Factors

In order to adequately mitigate Criterion F and L concerns, an individual has the burden of convincing the Hearing Officer that he can be trusted to be honest and forthright with DOE in the future. In addition, in a case such as this, an individual must demonstrate a significant pattern of responsible behavior in order to resolve the Criterion F and L concerns. *See, e.g. Personnel Security Hearing, Case No. TSO-0411*, 29 DOE ¶ 83,050 (2007); Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House, Guideline E, ¶ (c), Guideline F, ¶¶ (a), (c), (d).

Regarding the Criterion F concerns, the Individual testified that he did not intentionally withhold information from the DOE. He attributed his incorrect or incomplete answers to his misreading of the QNSP questions. He explained that he would not have disclosed the felony arrests and withheld the less significant misdemeanors if he were intentionally hiding information (because he was embarrassed by it or worried about how it would look). The Individual stated that he understood that he would have to be more careful in completing QNSP's in the future and ensuring that the information he provided to DOE was accurate and complete. In addition to the Individual's testimony, the Individual's colleague, who was aware of the Individual's past, believed the Individual to be an honest person who had overcome a difficult period in his life.

The letters from various other colleagues of the Individual speak to the Individual's good character. Finally, the polygraph examiner concluded that none of the Individual's responses during the polygraph exam were indicative of deception.

Based on the evidence before me, I am unable to find that the Individual has mitigated the Criterion F concerns. I find the Individual's explanation of his omission of significant information on the QNSP unpersuasive. Based on the Individual's professional accomplishments and credentials, discussed at the hearing and summarized in an exhibit submitted by the Individual, it is reasonable to conclude that the Individual is an accomplished, competent professional. *See* Tr. at 35-39; Indiv. Ex. 10. I find it difficult to believe that a person with the Individual's qualifications would misread a question so completely as to omit a significant portion of his past. However, even assuming the Individual's explanation to be true, it demonstrates a lax attitude toward security reporting requirements. Such a careless attitude is unacceptable in DOE clearance holders.

As to the Criterion L concerns associated with the Individual's past criminal behavior, the Individual maintained that his arrests occurred during a relatively short, difficult period in his life where he was drawn into his ex-wife's lifestyle, and he stated that he had no intention of ever returning to that lifestyle. The Individual brought forth the testimony of one witness attesting to his good character, as well as general character letters from other individuals.

Given the evidence in the record, I find that the Individual has failed to mitigate the Criterion L concerns associated with his past criminal behavior. The Individual's colleague has known him for approximately four years and their relationship is primarily a professional one. There was no testimony presented at the hearing from witnesses who know the Individual well on a personal level and could answer specific questions regarding his past and his character in general. In that regard, testimony from witnesses who knew the Individual before and during the time he cared for his ex-wife, and engaged in most of his criminal behavior, would have been particularly relevant. Letters from colleagues which deal primarily in generalities rather than specifics are no substitute for live testimony from witnesses who are subject to cross-examination and can be asked specific questions. Therefore, the Individual's testimony as a whole remains largely uncorroborated. Even assuming that the Individual testified honestly, there is simply insufficient information in the record to outweigh the Individual's significant past criminal behavior.

Finally, regarding the webpage cited in the Notification Letter, the Individual's explanation – that the webpage was created by an independent consultant to his company without his

knowledge – is uncorroborated by any other testimony or evidence. Nonetheless, regardless of whether the Individual's explanation is true, this is a small matter which does not change the result here.

V. CONCLUSION

Upon consideration of the record in this case, I find that there was evidence that raised doubts regarding the Individual's eligibility for a security clearance under Criteria F and L. I also find that there is insufficient evidence in the record to fully resolve those doubts. Therefore, I cannot conclude that granting the Individual an access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I find that the Individual's request for an access authorization should not be granted at this time.

Diane DeMoura
Hearing Officer
Office of Hearings and Appeals

Date: July 24, 2008